FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 21
CA107/18

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the Reclaiming Motion by

ARDMAIR BAY HOLDINGS LIMITED

Pursuer and Respondent

against

JAMES DOUGLAS CRAIG

Defender and Reclaimer

Pursuer and Respondent: Lord Davidson of Glen Clova QC; CMS Cameron McKenna Nabarro Olswang LLP
Defender and Reclaimer: Howie QC, McGregor; Brodies LLP

12 May 2020

[1] In October 2017 the parties entered into an agreement for the purchase by the pursuer from the defender and others of the whole share capital of the Craig Group Ltd ("the Company") for a price of £82,570,677. The agreement in question, known as the Sale and Purchase Agreement ("the SPA"), was executed on 14 October 2017. The Company and its subsidiaries provide support and supply vessels and emergency response and rescue services to operators in the North Sea oil industry. The defender was a major shareholder in

the Company. The pursuer alleges that the defender, together with other shareholders, is liable for two breaches of warranties contained in the SPA, and is also liable for breach of a further clause of the contract dealing with matters becoming known between the date of execution of the SPA and its completion. Before the Commercial Judge the pursuer also advanced two further cases based on wilful concealment and common law misrepresentation, but these were rejected by the Commercial Judge and are no longer maintained.

[2] All of the remaining three grounds of action relate to alleged failures by the defender and other shareholders to disclose that, immediately prior to the execution of the SPA Repsol, a major client of the Company, had emailed an invitation to tender ("ITT") for services that were at the time provided by a subsidiary of the Company. The pursuer claims that the terms of the invitation to tender indicated that the Company was likely to lose its two most valuable contracts, or at best would require to renegotiate those contracts on markedly less favourable terms. That is said to amount to a breach of two warranties, one relating to the completeness and accuracy of a document known as the Current Contracts Summary ("CCS") and the other relating to the disclosure of negotiations relating to the Company's business. In short, the pursuer alleges that the receipt of the ITT was a matter that should have been included in the CCS but was not, and that the ITT initiated negotiations that should have been notified prior to signature of the SPA. The pursuer further alleges that the defender is liable for breach of a clause, clause 8.1.3, which requires disclosure of certain matters arising during the period between execution and completion of the SPA. The Company bid for renegotiated contracts with Repsol but was unsuccessful. The pursuer estimates its loss from the breaches of warranty and breach of contract to be £16,800,000.

[3] Before the Commercial Judge the pursuer was successful in arguing that the defender was liable for breaches of the two contractual warranties and breach of the notification requirement in clause 8.1.3. The Judge accordingly pronounced declarator that the defender was in breach of the SPA in respect of the two breaches of warranty and the further breach of contract relating to non-disclosure. By interlocutor dated 11 September 2019 she allowed a proof before answer restricted to quantum. The defender was granted leave to reclaim against that interlocutor.

Background

[4] The Company and its subsidiaries owned and operated one of the largest wholly-owned British shipping fleets engaged in the UK offshore industry. The defender was the largest single shareholder in the company, holding 46.73% of its shares. He had joined what was then a family business in about 1977, when it was principally involved in deep sea trawler fishing in the North Sea. He became managing director but, upon his father's death in 2010, he became chairman. Under the provisions of the SPA he received £33.5 million of the consideration paid for the company's shares. From 1977 onwards the business had been developed significantly through the creation of a number of new companies operating in marine and offshore services and the development of bases in Singapore, Houston and Abu Dhabi, as well as elsewhere in the UK. By the time when it was sold the group provided emergency and rescue services, assistance to tankers, supply services to platforms and rescue boats to about 50 offshore installations.

[5] North Star Shipping (Aberdeen) Ltd ("North Star") is a subsidiary of the Company. North Star provided support vessels, known as "emergency response and rescue vessels" ("ERRVs"), and services to offshore installations. The ERRV business in the UK is a highly

regulated sector. Among the vessels operated by North Star were two specialist "S-class" vessels, the Sceptre and the Sovereign. These were purpose built to satisfy certain health and safety and operational requirements for North Sea oil installations operated by the company that is now known as Repsol Sinopec Resources UK Ltd ("Repsol"). Each vessel had a maximum displacement of 5,000 tonnes with an assigned draft of 5.0 metres ("the displacement requirement"). By comparison with other vessels operating in the same sector, those represented a relatively low displacement and draft. The S-class vessels were constructed with a low displacement to meet the requirements of Repsol's North Sea installations. Those installations were considered "ageing assets", and consequently a low displacement was needed to protect the integrity of the installations and to prevent the risk of significant damage to them.

[6] The S-Class vessels became operational in 2013. North Star provided them to Repsol on an exclusive basis, together with associated support services, pursuant to two five-year charterparties. The charterparties included five successive one-year options whereby Repsol could extend the charterparties on the same terms. The charterparties were due to expire, respectively, in May and in October 2018. The options were exercisable on 90 days' notice, that is, in about March and August 2018. Generally, an option would be exercised about four or six weeks before. If that had occurred, the two charterparties would have been extended until May and October 2023 respectively. In the event, the options were not exercised.

[7] The S-class vessels' ability to comply with Repsol's displacement requirements was understood by the Company's management team to be unique among service vessels operating in the North Sea. Consequently North Star, so long as it retained the vessels that satisfied those displacement requirements, had a *de facto* monopoly of ERRVs capable of

servicing Repsol's installations. That enabled North Star to charge a premium day rate for those vessels. In 2013 the rate had been approximately £13,500 for each of the S-class vessels, which increased to £13,700 in 2015 and dipped to £13,400 in 2016. This was approximately double the day rate for other vessels. The S-class vessels were accordingly a major contributor to the value of North Star's and the Company's business.

[8] The management of the Company thought that the *de facto* monopoly enjoyed by North Star through its ownership of the S-class vessels would ensure that Repsol's options would be exercised following the termination of the existing charterparties for those vessels. That would mean that in practice the contractual arrangements between North Star and Repsol would continue until 2023, with consequent benefits to the Company's income stream. In the course of the negotiations that preceded the SPA the pursuer's advisers, Wood MacKenzie (see paragraph [16] below), examined the charterparties entered into by the Company and its subsidiaries. Their analysis, which was of importance in determining the pursuer's approach to the SPA, proceeded on the assumption that the S-class vessels would continue to be required by Repsol into the option period. They further noted that North Star made a great deal of money from the S-class vessels, notwithstanding possible difficulties in Repsol's long-term position. Overall, therefore, the pursuer proceeded on the assumption that Repsol would in fact exercise its options. The Commercial Judge states that there was no doubt that those who represented the Company, including its management, were well aware of that approach to the valuation of the Company.

The parties' contract

[9] The SPA is a contract for the sale and purchase of the whole of the issued shares in the Company. The Sellers, defined in Part 1 of the Schedule, comprise the defender, two

other persons and two sets of trustees; the defender holds 13,968 of the 29,894 issued shares. The Buyer is defined as the pursuer. Clause 2 provides that the Sale Shares (a defined term) are to be sold with effect from Completion of the sale and purchase; the Completion Date is defined as 6 November 2017, although the Commercial Judge found that Completion in fact occurred on 2 November 2017 (opinion, paragraph [5](4)). Clause 3 defines the manner in which the Purchase Price is calculated. This involves basic price of £101,500,000 with a range of adjustments. The Provisional Purchase Price was set at £82,300,296.

[10] The parties' dispute turns principally on three particular provisions of the contract: first, clause 8.1.3; secondly paragraph 11.3 of the warranties in Part 4 of the Schedule; and thirdly paragraph 26 of the warranties in Part 4 of the Schedule, and in particular paragraph 26.6 thereof. We will set out these provisions in turn.

[11] Clause 8 of the SPA deals with the period before completion. It imposes obligations on the Warrantor, a term defined as being the defender. So far as material, the clause provides as follows:

> "8.1 The Warrantor shall ensure that during the period beginning on the signing of this Agreement and ending at Completion: […]
>
> 8.1.3 the Warrantor shall, as soon as reasonably practicable, notify the Buyer in writing of any matter which becomes known to him after the date of this Agreement and before Completion which constitutes, or might reasonably be expected to constitute, a material event in respect of the Business".

The term "material event" is not expressly defined. Clause 9 deals with Completion. Clause 9.3 provides that Completion is conditional on compliance by the Warrantor with its obligations under clause 8.3.

Warranties

[12] Clause 10 of the SPA deals with the contractual warranties. So far as material, it provides as follows:

> "10.2 The Warrantor warrants to the Buyer that each Warranty (other than the Title Warranties and the Warranties set out in paragraph 27 of Section B of Part 4 of the Schedule) is true and accurate as at the date of this Agreement".

[13] Part 4 of the Schedule to the SPA contains extensive warranties. Those that are relevant to the present proceedings are found in paragraphs 11 and 26. First, paragraph 11, headed "Contracts", provides:

> "11.2 Complete and accurate copies of all Material Contracts have been Disclosed.
>
> 11.3 There are no outstanding or ongoing negotiations of material importance to the business, profits or assets of the Company or any of the Subsidiaries, or any outstanding quotations or tenders for a contract that, if accepted, would give rise to a material Contract".

"Material Contract", as used in the two foregoing provisions, is defined as:

> "(i) all charter agreements to which the Company or any of the Subsidiaries is party; and/or (ii) all other agreements to which the Company or any of the Subsidiaries is party which are of material or fundamental importance to the operation of the Business".

[14] Paragraph 26, headed "Vessels" provides:

> "26.6 Document 6.1.1 of the Disclosure Bundle ("Current Contracts Summary") sets out complete and accurate details of all the charter arrangements that are in place as at the date of this Agreement in relation to all of the Vessels".

The Current Contracts Summary referred to in the foregoing warranty ("CCS") had emerged during earlier sale negotiations between Basalt Infrastructure Partners ("Basalt"), a midmarket infrastructure fund focusing on equity investment in Europe and North America, and the Company in 2016. It was a detailed document, incorporating, in respect of each vessel owned by the sellers, utilisation figures for each vessel, average day rates,

estimated cessation of production ("CoP") for the platforms serviced, assumed scrap weights and a comments section relative to each vessel which contained information not falling under any other headings but which was important for the buyers of the business to know and track. The CCS disclosed that the Sceptre/Sovereign contracts with Repsol were due to end in October/May 2018, but that the option end dates were October/May 2023. Thus the option arrangements were clearly referred to in the CCS. This appears to us to be a matter of some importance.

The chronology of the transaction

[15] It is convenient to refer, as the Commercial Judge did, to the two sides of the transaction as the buy side and the sell side, the former being the pursuer and the latter being the existing shareholders of the Company. Those operating on the sell side were as follows. The managing director of the Company was Callum Bruce; he was retained after its sale as chief executive. He was also a director of North Star. The group finance director was Graham Payton. He was the prime conduit of information from the Company management team to the sellers' agents, Simmons and Company ("Simmons"); Simmons provides advisory services for mergers and acquisitions. The commercial director of North Star was Gordon Wallace; he was kept on as chief operating officer after the sale of the company. Messrs Bruce, Payton and Wallace, and Alan Holden, were defined as the company's "Managers" in the SPA. The defender was not actively involved in the exchange of information between the pursuer and the sellers in the period prior to the signing date. The advisers primarily involved were Ross Atkinson and Fraser Dobbie of Simmons, who both gave evidence, and Douglas Crawford of Brodies LLP, who was the defender's solicitor in connection with the SPA.

[16] Those operating on the buy side of the transaction were as follows. The entity which funded the pursuers' acquisition of the company was Basalt. Steven Lowry was one of Basalt's founders and played a major role in the acquisition of the Company. Wood MacKenzie was responsible for carrying out due diligence on behalf of Basaalt in connection with the SPA, but this did not extend to legal diligence. Wood MacKenzie assisted in the analysis of commercial data provided in relation to the Company. Wil Jones was a project manager for Wood MacKenzie, reporting to Malcolm Forbes-Cable, a vice president of that business. Wei Lui worked on financial modelling for Wood MacKenzie.

[17] Mr Lowry had become aware in 2016 of an Aberdeen based business (the Company) whose owners were interested in selling it and which, compatibly with Basalt's investment model, was subject to regulatory oversight, operated in a market with high barriers to entry, was driven by health and safety regulation, and had tangible assets and fixed term contracts. Simmons sent an information pack about the company to Mr Lowry. He delegated the day to day management of the potential deal to Wil Jones. Basalt made an indicative offer for the Company of £152 million on 28 September 2016, subject to due diligence. As a consequence of due diligence undertaken by Wood MacKenzie, this valuation could not be supported. The offer was withdrawn on 3 November by a letter indicating concern about uncertainty in the market and, in particular, whether the contract or day rates had "bottomed out".

[18] A second approach to buy the company was made in 2017, after Simmons had produced an updated business plan and forecasts. On 13 June 2017, Basalt submitted a new offer of £110.5 million. £10 million was deferred against future performance, reflecting the buy side's view that the decline in day rates had abated or reached an acceptable level. A further exchange of information on 16 June led to the offer being amended to £105 million

without deferral. On 21 August, the North Star management team, via Simmons, provided a market update, reflecting a reduction in the day rate for several vessels. This was the day before Mr Lowry was to meet North Star's managing director. A final offer of £101.5 million was made on 29 August and was accepted.

[19] Mr Lowry had explained in evidence that prior to each offer being made, the pursuer had spent time with the management team of North Star going through "contract by contract, vessel by vessel" to understand the status of each. The current and future contracts, including those for the deployment of the S-class vessels and associated services to Repsol, were integral to the pursuer's valuation of the Company, and the Company's contracts, present and future, were "crucial to understanding the value of the business". The Company's management team described the S-class vessels as "specialist" and "purpose-built" for Repsol and on long-term contracts. The sellers' forecast of the day rates for the S-class vessels was not affected by general concerns about a fall in day rates, because it was only the Company that was in a position to meet Repsol's specific needs. Thus the Company was not concerned about competition for Repsol's business, and proceeded on the assumption that the existing contracts for the S-class vessels would be extended for the duration of the options.

The email exchange of 5 October 2017

[20] The buyers' and sellers' sides exchanged emails on 5 October 2017. One of the Basalt team emailed Simmons at 9.37am with a query about the S-class vessels:

> "… we are not clear on the circumstances of the previous rate reductions for these vessels. If management could provide their expectation and rationale for the day rate for these assets in the option period that would be helpful".

Fraser Dobbie forwarded the query to Messrs Bruce and Wallace asking for a response. Mr Wallace replied, copying in Messrs Paton and Bruce, by asking Mr Dobbie whether the rate level he had projected for both of the S-class vessels was £10,000 or £12,000. At 12.56 Ross Atkinson of Simmons responded, copying in Messrs Wallace, Bruce, Payton and Fraser Dobbie, stating:

> "The Sceptre and Sovereign are currently in the financial model on rates of £13.4k on contracts, we have assumed the option period to go out to 2023 at these rates and the rate then basically stays the same at £13.4k under our market assumptions.
>
> Not sure where the £10k/£12K comes from?"

At 13.31 Fraser Dobbie responded to Messrs Bruce, Wallace and Payton:

> "…these are essentially carried through at the contract rate throughout the forecast. [It] has been decided the best thing was to keep the external view that the vessels are unique and Repsol have nowhere else to go, as such why would the rate move".

[21] At 15.23 Gordon Wallace replied to an earlier email from Fraser Dobbie with a proposed reply to Basalt:

> "The Grampian S class vessels were purpose-built to satisfy HSE requirements whilst working alongside certain ageing North Sea assets. *This followed a Global Tender exercise to identify the specific tonnage capable of meeting the charterers [sic] requirements, consequently, we believe that the Grampian S class vessels are the only vessels capable of meeting this specific requirement.* ~~As far as we are aware these are currently the only vessels in the North Sea that can satisfy these requirements.~~ As such the rate expectations would be in line with projected expectations. <u>The current time we have no information on Repsols [sic] Marine strategy going forward, as such we have based assumptions on current operating practice by the charterer.</u>
>
> The rates were reduced by a token amount in 2016 as a strategic move to resecure multiple ERRV Contracts".

Fraser Dobbie proposed deleting the sentence underlined. He gave two reasons for this in evidence: first, that Mr Wallace could not have a valid opinion on the subject matter, but secondly, after it was noted in cross examination that the deleted sentence was a statement

of fact, that it was best to keep diligence responses "concise". Mr Wallace emailed a further amendment adding the italicised text and deleting the text struck through.

[22] Fraser Dobbie responded to Basalt at 16:11:

> "1) The rates were reduced by a token amount in 2016 as a strategic move to re-secure multiple ERRV Contracts.
>
> The Grampian S class vessels were purpose built to satisfy HSE requirements whilst working alongside certain age-ing North Sea assets. This followed a Global Tender exercise to identify the specific tonnage capable of meeting the charterers [*sic*] requirements, consequently, we believe that the Grampian S class vessels are the only vessels capable of meeting this specific requirement. As such the rate expectations would be in line with projected expectations" (emphasis added).

Wood MacKenzie gave advice to Basalt on the basis of this response, in the following terms:

> "For the S-Class vessels the minimum day rate reduction in the 2016 as part of a larger contract deal highlights to us the specific nature of the Sceptre and Sovereign vessels. In light of this it is fair to assume that the options will be exercised at the current rate. Post the option period we will take into consideration the reduced operational base of platforms of Repsol Sinopec at that time and assume a utilisation of 90% for the vessels at management day rate".

[23] Prior to receipt of this email, Wood MacKenzie's analysis had been that the options would be exercised by Repsol but that the rates would drop by approximately 35%. That assumption changed because North Star confirmed that, because of the bespoke nature of the S-class vessels, these were the only vessels capable of meeting Repsol's needs. In his evidence Mr Forbes-Cable explained that he would have found it helpful to see the sentence which had been deleted before the final draft of the 15.23 email was sent out (see paragraph [21] above). He stated that if Wood MacKenzie had not received confirmation from North Star that the day rates would be maintained at current levels during the option period, they would not have revised their original analysis. Mr Forbes-Cable stressed the significance of the S-class vessels to the overall valuation of the company; their day rates were the highest of all the vessels, and thus had a disproportionate impact on the valuation.

Repsol's email of 13 October 2017

[24] Late in the afternoon of 13 October 2017 the Company received an email from Repsol; the email was timed at 16.23. A covering letter and an ITT were attached. The email did not refer specifically to the S-class vessels, but details in it made it clear that it referred to the services currently provided by those vessels, in particular the commencement dates specified (May and October 2018). The Commercial Judge notes (paragraph [62]) that the sell side management team knew that it referred to those vessels. In the email Repsol noted a requirement for two Platform Supply Vessels (PSVs) starting in late May and late October 2018 for one, two or three years plus options. The letter further stated that a methanol capability was mandatory on the vessel delivering in May. Tenders were required by close of business on 31 October 2017. The covering letter requested competitive "tenders" for PSV services beginning in late May for the first vessel and late October for the second. Bids were invited for contracts of one and three years, each with two one-year options, and for two years, with three one-year options. A methanol capacity was required for the vessels sought from May 2018, although it was indicated that alternative tenders would be considered if they provided a robust and cost effective solution. The letter stated that Repsol reserve the right to award a contract to none or one or more tenderers.

[25] Accompanying the email was an ITT. The technical specifications for the PSVs in the ITT did not stipulate any requirement for displacement or deadweight tonnage. That meant that there was no maximum requirement for either displacement or deadweight tonnage. The ITT also referred to the possibility that a vessel might be tendered with a methanol capability. The Commercial Judge notes (paragraph [63]) that the most significant feature of the ITT was the absence of any displacement requirement, because that meant that the S-

class vessels lost their advantage of being the only vessels capable of meeting Repsol's requirements. Also significant was the new stipulation regarding methanol capacity for vessels serving the Repsol platforms, as the S-class vessels did not have that capacity. Retrofitting them to provide methanol capacity would cost approximately £500,000 per vessel. It was also significant that the date of commencement of any successful tenderer was the date when the first option under the existing charterparties became operative. Thus the granting of a charter in accordance with the ITT would be inconsistent with the exercise of the options in respect of the S-class vessels.

The sell side's reaction to Repsol's email and accompanying documents

[26] As already noted, Repsol's email was sent late in the afternoon of 13 October 2017. That evening the completion meeting was scheduled to take place at Brodies' office. The timing accordingly caused difficulties. Evidence was led about the reaction of the Company's employees to receipt of Repsol's email on 13 October 2017. Callum Bruce, the Company's managing director, received the email and ITT at 17.23. He gave evidence that it was clear from the email that it related to the S-class vessels. Shortly afterwards Gordon Wallace, the Company's chief operating officer, had also received the email, and contacted Mr Bruce with a comment that the timing was bad. Mr Bruce forwarded the email to Simmons, but they did not ask to see the ITT. It appears that no individual on the sell side opened up the ITT on the date when it was received; that did not occur until four days later, on Tuesday 17 October.

Completion of the contract for the sale of the shares in the Company

[27] The Commercial Judge notes (paragraph [67]) that she heard a considerable amount

of evidence about the meeting for completion of the contract that had been fixed for Brodies' office during the evening of 13 October 2017, including the advice that was tendered (principally by Douglas Crawford of Brodies) and the defender's participation for part of the meeting; he made a call from on board a cruise ship. It was not controversial that none of the North Star management team had opened the ITT attached to the Repsol email. The meeting was attended by Douglas Crawford, but he was not told about the reference in the email to a requirement for methanol capacity, or the anticipated cost, in the region of £500,000 per vessel, of adapting the S-class vessels to provide such a capability. As to the timing and significance of the Repsol email, this was represented to Mr Crawford as a normal business event. The Commercial Judge notes that this was significant; Mr Crawford had considered the warranties that were to be granted and advised the defender that he did not require to disclose the ITT. No reference was made at the meeting to the representation in the Simmons email of 5 October 2017 (paragraph [20] above), to the effect that it had been assumed that the option period on the two S-class vessels would continue until 2023 at existing rates. Nor, therefore, was any reference made to the need to correct that email.

[28] The agreement between the parties was signed on 14 October 2017. Consequently it seems clear that the understanding of the representatives of both the buyers' and the sellers' sides following the meeting the previous evening was of fundamental importance to that agreement. Evidence was led regarding the significance of the receipt of an ITT. Gordon Wallace stated that ITTs were used as a means of generating competition. Mr Wallace and Callum Bruce were both surprised that the ITT had been issued so early, well before the options in respect of the S-class vessels fell to be exercised. The Commercial Judge observes that the receipt of an ITT was "not a neutral factor". Mr Wallace had accepted in evidence that the ITT had the potential to "make Basalt think again". The defender had given

evidence to the contrary, that the ITT was not a surprise to him or even the management team, but the Commercial Judge described that evidence as not credible and inconsistent with the other witnesses.

[29] Evidence from Mr Wallace indicated that the market for PSVs in October 2017 was "soft", and that charter rates were subject to downward pressure. That would apply to Repsol. Mr Wallace considered the ITT to be important, because of the significance of the charterparties for the S-class vessels. Consequently it was a matter about which the sell side's lawyers should be informed. The evidence of Callum Bruce was broadly to the same effect. He accepted in hindsight that the receipt of the ITT indicated that continuation of the charters for the S-class vessels would not be automatic, and Repsol were probably attempting to obtain a reduction in charter rates. The reaction of the representatives from Simmons was limited by the information that they had been given at the meeting about the ITT. Fraser Dobbie of Simmons had limited recollection of what was said, but he recalled that the North Star management team regarded the ITT as an ordinary business event. He stated that had he been acting for the buyer he would have asked further questions about the ITT. Ross Atkinson, the other Simmons representative, also accepted that the buy side would have an interest in knowing about the ITT because of its impact on the risk in respect of the S-class vessels.

[30] The Commercial Judge comments that the sell side management were well aware of the significance of the S-class vessels for the value of the business, the softening of the PSV market in the North Sea, and the buy side's focus on factors such as day rates to forecast future profitability. The latter factor had been demonstrated by Basalt's withdrawal of an offer for the Company in 2016, and the buy side's interest in day rates during the 2017 negotiations. The Commercial Judge comments (paragraph 91):

> "It is difficult to reconcile the sell side's collective quiescence on receipt of the ITT with their knowledge of these matters. All of the witnesses on the sell side accepted in one form or another that the buy side would have wanted to know about the receipt of the ITT, and that it introduced a risk of the S-Class Vessels charters not being rolled over".

She further notes that the witnesses on the sell side did not individually regard the ITT as within their managerial responsibility; significant downsides would only occur if the sale did not complete.

[31] The Commercial Judge records the evidence led about a telephone call that was made to the defender during the meeting in Brodies' office. For present purposes it is sufficient to note that she did not regard the defender's evidence as credible and reliable. In particular, his evidence that the ITT was not a surprise to him or others on the sell side was not credible. Otherwise the defender's evidence did not assist in assessing the materiality of the receipt of the ITT from Repsol. The Judge concluded, however, that she considered it more likely than not that the defender knew of the principal features of the ITT and Repsol email during the window between the meeting of 13 October and completion.

[32] Legal advice was given at the meeting in Brodies' office by Douglas Crawford, of that firm, to the effect that there was no requirement to disclose the email and the ITT. The Commercial Judge observes that Mr Crawford could only give advice on the receipt of the ITT based on the way in which that event was presented to him by the sell side management team. On that, she considered that the significance of the ITT was significantly downplayed; it was presented as an unremarkable, normal business event.

The consequences of the ITT and the failure to disclose it prior to completion

[33] As we have noted, the parties contract was signed on 14 October 2017. The receipt of the ITT had not been disclosed to the buy side at that time. Douglas Crawford

recommended that the ITT should be disclosed by the sell side, although not against the contractual warranties. In an email to the sell side, sent on 22 October 2017, Callum Bruce dealt with seven distinct matters, the fifth of which was the relationship with Repsol. That paragraph stated:

> "Repsol have issued an RFQ looking for a tender to be submitted mid-November, awarded likely in Q 1 next year, for the two 'S' Class vessels commencing on expiry of the current contracts in May and October next year. As per our normal approach as the incumbent but particularly as these are specialist vessels we will wait until near the submission date to come to a firm decision on the rate to be offered".

On receipt of this email, Steven Lowry circulated it to others within Basalt, with the comment "S class gets a mention but things look relatively solid". It was accepted that an RFQ (request for quotation) was not the same thing as an ITT, although in evidence Callum Bruce attempted to minimize the difference. A further meeting between the North Star management team and the buy side was held on 7 November 2017, and Callum Bruce telephoned Wil Jones of Basalt on 9 November, but no mention was made of the ITT on either occasion. Information about it was only provided on 30 November 2017, in reply to a direct question by the buy side. Steven Lowry stated in evidence that the buy side had been very surprised and believed that the ITT should have been disclosed before the signing date. In evidence both Steven Lowry and Ross Atkinson accepted that the ITT and the potential loss of the Repsol contracts was a serious matter. The Commercial Judge concluded that the buy side had been not been aware of the ITT prior to completion (paragraph [120]); it had been mischaracterised as a lesser "RFQ", the date on which it was received was withheld, and the abandonment of the displacement requirement and the requirement for methanol capacity were both omitted. That, she held, was misleading.

[34] Steven Lowry stated in evidence that if he had known about the ITT the buy side would have been "concerned" about other competitors for the Repsol contract. If he had

known of the ITT, the buy side would have paused and investigated it. The Commercial Judge states that he was "clear" that the buy side would not have signed the agreement until it understood the risk around the S-class vessels. The foregoing features, Mr Lowry stated, would have pushed the transaction "outside the parameters" that had been approved by Basalt's investment committee. Even in respect of methanol capacity, the buy side would have compared the specification appended to the ITT with the existing contract specifications, to seek comfort that the S-class vessels were still unique so far as Repsol's requirements were concerned. In addition, Mr Lowry stated that knowledge of the ITT prior to signing of the agreement would have led to adjustment of the price by a substantial margin, in view of the importance of the S-class vessels, which comprised between 20 and 25% of the Company's EBITDA (earnings before interest, taxation, depreciation and amortisation – in effect, gross earnings).

[35] Malcolm Forbes-Cable gave evidence that Wood MacKenzie had initially intended to discount the day rates for the S-class vessels by about 35% but changed that approach upon receipt of the Simmons email of 5 October 2017 (quoted at paragraph [22] above) to the effect that the S-class vessels were the only vessels capable of satisfying Repsol's precise requirements. Mr Forbes-Cable gave evidence, however, that the receipt of the ITT implied that Repsol were looking to revise the agreement, which affected the risk; it meant that Repsol were wanting to renegotiate the agreement, at a lower rate. Non-exercise of the options would result in a price impact of about £25 million. Evidence to broadly similar effect was given by Wil Jones, a more junior member of the buy side team. He stated that if he had known of the ITT that would have been "a major red flag".

[36] The Commercial Judge stated (paragraph [129]) that she had no hesitation in accepting the evidence of the buy side witnesses on the foregoing matters. The buy side was

intensely interested in the vessel contracts, day rates and other factors relied on to forecast the future profitability of the business. Basalt's 2016 offer had been withdrawn because of concern about day rates. We would observe that that conclusion appears to us to be a matter of clear commercial common sense. The day rates represent gross income, and as a matter of elementary economics gross income feeds directly through into earnings.

[37] Finally, on the issue of the consequences of the ITT, North Star submitted a tender to Repsol on 14 November 2017, in which day rates were cut by half, but the tender was unsuccessful.

The Commercial Judge's decision

[38] The Commercial Judge's decision proceeded on the evidence summarized in the last part of this opinion. She concluded that the defender was in breach of the SPA, in respect that the defender breached (i) warranties provided at paragraphs 11.3 and 26.6 of Section B of Part 4 of the Schedule to the agreement, consequent on clause 10.2 of the agreement; and (ii) the stipulation in clause 8.1.3 of the SPA. She accordingly allowed the parties a proof before answer on quantum. Her reasoning may be summarized as follows.

Breach of warranty in paragraph 26.6

[39] The defender's failure to include in the CCS any reference to the receipt of the ITT was a breach of warranty 26.6 (paragraphs [151]–[172]). That warranty used the term "charter arrangements", which required to be construed in the context of the SPA as a whole. So construed, the warranty covered something broader than the warranties in paragraphs 11.2 and 11.3. The existing options for the specialist vessels were details of charter arrangements in place; consequently "the receipt of the ITT clearly had the potential

to affect the charter arrangements" (paragraph [171]). Information raising a serious doubt about the exercise of the options was within the scope of the term "charter arrangements". Moreover, the data contained in the CCS included options that were exercisable for the period after the primary charter had expired. The foregoing construction was supported by the factual context. It was apparent that the commercial rationale of the transaction depended in large measure upon the value to be ascribed to the Company's future activities. The S-class vessels made a major contribution to its income, and it was likely that that would remain so in the future as long as Repsol retained the existing displacement requirement. The ITT, however, indicated that the existing arrangements might come to an end on the expiry of the existing contract, as there was a doubt about the exercise of the option. The ITT was therefore a detail of the charter arrangements in place for the S-class vessels.

Breach of warranty in paragraph 11.3

[40] The failure to disclose the ITT was a breach of warranty 11.3 (paragraphs [195]–[202]). Repsol, through the ITT, were saying that they were "considering not exercising the option but, rather, [were] renewing negotiations for vessels currently subject to a charterparty between us, but on terms other than those contained in the charter agreement and which exercise of the option would have continued". The ITT thus "signalled Repsol's clear intention to *re-negotiate* the options on offer" (Commercial Judge's emphasis). The "re-opening of negotiations" could be considered to be "outstanding or ongoing", particularly in the light of the evidence regarding the significance of the specialist vessels and the existing charterparties. Warranty 11.3 was particularly fact-sensitive; it was necessary to construe it against the evidence about the use of ITTs in this sector and the *de facto* monopoly the company had to satisfy Repsol's requirements. It was thus not helpful to consider

discussions of the word "negotiations" in other, very different, cases (eg *Harvela Investments Ltd* v *Royal Trust Company of Canada (CI) Ltd* [1986] AC 207) or general textbook discussions (Cartwright, *Contract Law*, (3rd edn; 2016), p 110; MacQueen and Thomson, *Contract Law in Scotland* (4th edn; 2016), para 2.17; Stair Memorial Encyclopaedia, Volume 15, s 626; MacNeil, *Scots Commercial Law* (2014), para 2.25). In this context in particular, the description of the ITT as a "unilateral" negotiation was inapposite, where North Star had no option but to respond if it wanted to retain Repsol's business.

Breach of clause 8.1.3

[41] There was a breach of clause 8.1.3 (paragraphs [214]–[221]). The email of 22 October 2017 did not meet the requirements of that clause because it had not been sent as soon as reasonably practicable, and it downplayed the significance of the ITT in terms of risk. Moreover, it did not expressly refer to the clause. The ITT was significant in that it signalled a disinclination on Repsol's part to secure the use of the S-class vessels without further negotiation. Consequently, against the whole evidence, background and context, the ITT was important to the future of the business. Thus it constituted a material event falling within the terms of clause 8.1.3, and the sell side were in breach of their obligation to give notice of that event.

Misrepresentation

[42] The pursuer also advanced a case based on misrepresentation. This was rejected by the Commercial Judge. She held that the communications alleged to be a misrepresentation did not have the requisite quality of a statement or representation of fact (paragraphs [247]–[249]). They amounted to no more than a statement of opinion by the defender of his expectation that the day rates charged for the vessels would continue because the options

would be exercised. Given that conclusion on misrepresentation, a further case based on wilful concealment was bound to fail (paragraph [255]). The matter of wilful concealment was closely related to, if not dependent on, the matter of misrepresentation. The Commercial Judge did, however, observe (paragraph [250]) that the law recognized a duty to correct a pre-contractual representation if by reason of events it subsequently became a misrepresentation by the point when the representee and representor entered into a contract.

The reclaiming motion

[43] The reclaiming motion proceeds on the following grounds. First, in relation to the warranty in paragraph 26.6 of Part 4 of the Schedule to the SPA, it was submitted that a proper construction of the warranty only required disclosure of charters that were in place as at the date of the SPA, 14 October 2017. There was no requirement for the defender, or the sell side generally, to mention the existence of any ITT. The Commercial Judge, it was said, was in error in having regard to commercial common sense rather than the "clear" language of the warranty. Furthermore, it was submitted that the ITT was not a "detail" of a charter arrangement in place as at 14 October 2017. Nor was the ITT a detail that required to be disclosed in the CCS. While it possibly had the potential to affect the existing charter arrangements, it did not affect those arrangements themselves.

[44] It is further submitted that the Commercial Judge was in error in failing to hold that the language used in the warranty did not extend to contract opportunities or potential future charters. The ITT was a unilateral document, whereas "arrangements" must be bilateral or multilateral. Furthermore, it was not "in place" as at 14 October 2017. Moreover, it was submitted that the Commercial Judge was in error in holding that

information raising a serious doubt about the exercise of the options swap was within the scope of the expression "charter arrangements"; it could only be concerned with future charter arrangements. The Commercial Judge had, in addition, conflated the words "agreements" and "arrangements". Nothing could qualify as a charter unless it were the product of agreement, and no arrangement or agreement had been occasioned by the receipt of the ITT. The terms of the existing charterparties were not impacted by the ITT or any other potential new contract or charter.

[45] Secondly, in relation to the warranty in paragraph 11.3 of Part 4 of the Schedule to the SPA, it was submitted that the Commercial Judge's reasoning summarized at paragraph [40] above was in error because it failed to recognize that negotiations must necessarily be bilateral or multilateral. An invitation to tender is an invitation to negotiate, rather than part of the negotiation itself, and consequently the receipt of the ITT did not give rise to any "ongoing" or "outstanding" negotiations; those required to be bilateral or multilateral. Furthermore, it was said that the Commercial Judge was in error in treating the concept of a "negotiation" as fact-sensitive. The established law on offers to negotiate was relevant. Nothing was said in the pursuer's pleadings to suggest that "negotiations" have anything other than its ordinary meaning. The ITT was a unilateral document, and thus could not form part of any negotiation. Nor can it be said that any negotiation was "outstanding" as at 14 October 2017. The wording of the ITT envisaged that it might not be taken up by the recipient, and it is stated that negotiations would follow a response to the invitation. Finally, on this issue, it was submitted that the Commercial Judge was in error in holding that the ITT signalled Repsol's clear intention to renegotiate the options on offer. If it did in fact signal an intention to renegotiate, it would not be part of any outstanding or ongoing negotiation.

[46] Thirdly, in relation to clause 8.1.3 of the SPA, it was submitted that the Commercial Judge failed to apply well-established principles of contractual interpretation. These, it was said, required the court to uphold the ordinary and natural meaning of words used. In clause 8.1.3 the words "any matter" are cut down by the qualification that such matter "constitutes, or might reasonably be expected to constitute" a material event in respect of the business. The word "constitutes" meant that something, of itself, amounted to something. It was not the initial step in a chain of events that might ultimately lead to a material event. Consequently the ITT did not trigger clause 8.1.3, and there was no breach of that clause. Clause 8.1.3 related to new events that took place after the parties had concluded the SPA, and the Commercial Judge had held that the defender was aware of the ITT before the SPA was concluded. In these circumstances, it was said, there was no scope for clause 8.1.3 to be engaged.

Contractual interpretation

[47] The general principles of contractual interpretation are now well established; they have been discussed at some length in cases such as *Rainy Sky SA* v *Kookmin Bank Co Ltd*, [2011] 1 WLR 2900, in particular at paragraphs 14 and 20-21, *Arnold* v *Britton*, [2015] AC 1619, at paragraphs 15 and 76-77, *HOE International Ltd* v *Andersen*, 2017 SC 313, at paragraphs 18 *et seq*, *Wood* v *Capita Insurance Services Ltd*, [2017] AC 1173, *Midlothian Council* v *Bracewell Stirling Architects* 2018 SCLR 606, at paragraph 19, and *Scanmudring AS* v *James Fisher MFE Ltd*, 2019 SLT 295, at paragraph 47. From these cases, a number of basic principles emerge. Four of these are important for present purposes.

[48] First, a contract must be construed objectively. The meaning of any particular provision is what a reasonable person in the position of the parties would have understood

it to be. Indeed, no other approach would be possible; a contract will have two or more parties, and it is obvious that its meaning cannot depend upon the subjective intention or understanding of any one of those parties. Unsurprisingly, therefore, the objective approach to contractual construction is supported by numerous authorities extending back over many years: see, for example, *Muirhead & Turnbull* v *Dickson*, 1905, 7 F 686, at 694. Secondly, the words of a contract must be construed contextually. Language is inherently ambiguous, and in no serious intellectual field is it possible to reach a sensible view on the meaning of a passage of text without placing that passage in context.

> "... [T]he relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract": *Rainy Sky SA* v *Kookmin Bank Co Ltd*, *supra*, at paragraph 14.

The relevant context takes in the contract itself, construed as a whole, and the surrounding circumstances that ought objectively to be known to the parties. It includes not merely the surrounding factual situation but also the legal context; that legal context comprises both the surrounding contractual and other legal arrangements and the general law. The Commercial Judge, correctly in our opinion, attached great importance to the specific context of the contracts construed as a whole.

[49] Thirdly, the provisions of a contract must be construed purposively, that is, in such a way as to give effect to the fundamental purposes of the contract; points of detail or niceties of wording should not stand in the way of achieving the contract's basic purposes. What the basic purposes are must obviously be determined on an objective basis, and the context is relevant. Fourthly, in construing a contract, commercial, or business, common sense may be important. Such an approach is supported by the recent case law: see, for example, *Rainy Sky SA* v *Kookmin Bank Co Ltd*, *supra*, at paragraphs 20 and 21, and *Arnold* v *Britton* (*supra*), at

paragraph 76. The application of commercial common sense is a relatively straightforward process, despite suggestions to the contrary in some academic literature. It obviously involves elements of general common sense as an aid to practical reasoning, such as considering whether a view is widely held by those with knowledge of the particular field in question, and testing a proposition against its converse, to discover whether the converse makes sense; if it does not, that will usually support the proposition. At a commercial level, the most important factor is probably the use of elementary microeconomics (the branch of economics that covers the behaviour of individuals and businesses in their commercial dealings with other persons). That will normally involve consideration of the practice followed in a particular trade, and the understanding held by people operating in that trade, for example as to what is commercially important or what would be regarded as commercially undesirable.

Application to the parties' contract

[50] The Commercial Judge held that the defender, and others on the buy side, was in breach of each of the warranties provided at paragraphs 11.3 and 26.6 of Part 4 of the Schedule, and was further in breach of clause 8.1.3 of the contract. We agree with her conclusions on all of these matters.

Warranty at paragraph 26.6

[51] This warranty is to the effect that the Current Contracts Summary provided by the sell side to the buy side "sets out complete and accurate details of all of the charter arrangements that are in place as at the date of this Agreement in relation to all of the Vessels". The context of this warranty and its commercial function appear clearly from the

evidence as narrated by the Commercial Judge: see paragraph [14] above as to its commercial function and paragraphs [5]-[7], [19] and [20]-[23] as to its context. The Company's business, partly through its subsidiary North Star, consisted of the chartering of specialist vessels to the operators of North Sea oil fields in order to meet a range of specialized requirements. The Company's income came from the charterparties. The value of the business therefore depended on the amount of such income together with the level that that income was likely to achieve in the future. That is an elementary exercise for the valuation of a business, and it emerged clearly from the evidence led at proof. It follows that the value of the business, and accordingly the price that it might reasonably command, depended fundamentally on the likely future income from vessel charters. That is why the Current Contracts Summary was prepared, and why its completeness and accuracy were of fundamental importance to valuing the business. That view is based on an objective analysis of the contract, construed in context and in the light of commercial common sense. Such a view is, moreover, supported by the evidence regarding the significance of the Repsol email of 13 October 2017 and the accompanying ITT: see paragraphs [24]-[26] and [29]-[30] above.

[52] The warranty in paragraph 26.6 must be construed in the light of these considerations. Objectively, reasonable persons in the position of the parties must have intended that everything in the charter arrangements that might affect the Company's future income stream should be disclosed in the CCS; the contrary view would make no sense, as it is the future income stream that will determine the value of the business. The ITT was plainly a development that could have an important effect on North Star, and hence the Company's, future income. Until it was received, it was assumed that North Star had for practical purposes a monopoly on Repsol's business, as the S-class vessels were understood

to be the only vessels operating in the North Sea that were capable of servicing Repsol's facilities, owing to their displacement and draft. The ITT made it clear that that was no longer the case. According to its terms, Repsol intended to abandon the displacement and draft requirements, and further intended to introduce a methanol requirement for one of the vessels. That would destroy North Star's monopoly. There was accordingly a serious risk that the Company's most profitable contracts, those with the two S-class vessels, would be lost. The foregoing reasoning proceeds on an objective analysis of the contract, taken in its commercial context, but it is supported by the evidence of the buy side's witnesses as noted by the Commercial Judge; they regarded the information that they had been given as misleading: see paragraphs [33]-[36] above.

[53] In view of the importance of Repsol's business to the Company, it would be remarkable if a serious threat to deprive the Company of that business were not covered by the warranty in paragraph 26.6. In our opinion the existence of the ITT, and the documents that accompanied it, clearly fell within the terms of that warranty. The warranty refers to "charter arrangements". "Arrangements" is normally a less precise, and consequently wider, expression than "agreements" or "contracts"; in our opinion in its normal meaning it signifies both contracts and the framework in which those contracts operate, including such matters as subsidiary and ancillary contracts, option rights and rights to terminate contracts. In the context of the SPA there are particularly strong reasons for giving the word "agreements" such a meaning, because if we are exercising rights of that nature they are capable of bringing the existing arrangements to an end, with serious financial consequences for the Company and a purchaser of its shares.

[54] The warranty requires that the CCS should set out "complete and accurate" details of the charter arrangements. Those words are important. Construed in context, they indicate

that every element in the charter arrangements, including option rights and rights to terminate contracts, must be disclosed. The word "details" is also important, in that it signifies that all rights of that nature must be stated in a precise and intelligible form.

[55] When the warranty in paragraph 26.6 is construed in the manner that we have indicated, we are of opinion that the sell side's failure to disclose Repsol's email of 13 October 2017 and the accompanying ITT had the result that complete and accurate details of all of the charter arrangements in place at the date of the Agreement were not disclosed. That amounts to a breach of the warranty, with the consequence that the sell side, including the defender, are liable to the pursuer in damages.

Defender's arguments on paragraph 26.6

[56] Counsel for the defender presented a range of arguments to the effect that there had been no breach of warranty. In large measure these were based on a strongly literal approach to contractual construction. In supporting such an approach counsel placed considerable reliance on *Arnold* v *Britton*, *supra*, at paragraphs 17-20. In interpreting those paragraphs, however, it is important to bear in mind that they are directed at the particular facts of that case, which were highly unusual in that they turned on a clause that contained a precise mathematical formula based on the compounding of an annual payment. The consequences of that formula were entirely foreseeable. The most extreme problem with a totally literal approach to construction occurs in cases where supervening events are not readily foreseeable, especially the sort of events that are sometimes described as "unknown unknowns". In such cases it cannot be said that "the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision"; and it is unrealistic to emphasize the parties' control over the language that they

use in a contract. In cases of that nature, an emphasis on a strictly literal approach may produce a result that is arbitrary or disproportionate, which is plainly undesirable as a matter of commercial common sense. Alternatively, a highly literal construction may lead to significantly longer contracts, a practice that is likely to impose greater transaction costs on the parties than occurs at present. Overall, we are of opinion that construing contracts according to the standards of a reasonable commercial person, as laid down in the cases cited at paragraph [49] above, is likely to produce greater predictability than an over-literal approach to construction.

[57] On the evidence accepted by the Commercial Judge it is apparent that Repsol's email of 13 October 2017 and the accompanying ITT were not foreseen by the parties: see paragraphs [19] and [21]-[23] above. Consequently a standard approach to contractual interpretation should be adopted, with proper reliance on the purpose of a contractual provision and commercial common sense. Counsel for the defender submitted that the wording of the warranty in paragraph 26.6 indicated that what required to be disclosed were charters in place as at the date of the agreement, on 14 October 2017, and that those were set out in the CCS. In our opinion that ignores the wording of the warranty, properly construed. The warranty requires that "charter arrangements" should be disclosed, and that "complete and accurate details" should be given of those arrangements. For reasons that we have already considered at paragraphs [52] and [53], we are of opinion that the existence of the Repsol email and the ITT fell clearly within those expressions, and should accordingly have been disclosed. No rewriting of the parties' agreement is involved. The ITT had not been fully implemented at the time that the SPA was concluded, but in that respect it was similar to an option or other contingent obligation or liability affecting a contract; it was a "detail" of the "charter arrangements" in force at that date.

[58] Counsel further submitted that the expression "charter arrangements" signified arrangements that were bilateral or multilateral. The ITT, by contrast, was a unilateral document. In our opinion that involves a mischaracterisation of the ITT. While it was exercisable by one party, it formed an important element in the overall arrangements governing the chartering of the two S-class vessels. This is not affected by the fact that the ITT would take effect at the point where the existing charter came to an end. For reasons already discussed, the parties clearly contemplated that the option to continue the charter party, which formed part of the existing chartering arrangements, would be exercised. For that reason we consider that the foregoing arguments must be rejected.

Warranty at paragraph 11.3

[59] So far as material to the parties' dispute, the warranty in paragraph 11.3 provides that "There are no outstanding or ongoing negotiations of material importance to the business, profits or assets of the Company or any of the Subsidiaries". This must be read in the context of warranty 11.2, which provides that complete and accurate copies of all Material Contracts have been disclosed. The expression "Material Contracts" is defined as covering all charter agreements to which the Company or its subsidiaries is party which are of "material or fundamental importance to the operation of the Business"; there can be no doubt that the charterparties for the two S-class vessels were material contracts in that sense; it was a matter of agreement that they were by some margin the Company's two most profitable charterparties, with charter rates well above the industry norm. The Commercial Judge held that the warranty required to be construed in context, against the evidence about the use of ITTs in this sector and the *de facto* monopoly that the Company had to satisfy Repsol's special displacement requirement by using the S-class vessels. The existence of an

option meant that the party who held the option could obtain the vessel without further negotiation, simply by exercising an existing right. The ITT meant that Repsol was considering not exercising the option but would rather renew negotiations for the S-class vessels that were currently subject to a charter party, but on terms that were different from those in the existing charterparties.

[60] In our opinion the Commercial Judge's reasoning is correct. The ITT was an invitation to a number of persons, including North Star, to tender for a charter party serving the Repsol oil installations but on terms that were materially different from those in the existing charterparties for the S-class vessels. In particular, the displacement requirements were to be changed, and for one of the two vessels a methanol facility was required. Moreover, it was apparent that the change in requirements removed North Star's *de facto* monopoly, and was thus likely to result in a substantial reduction in charter rates. In our opinion all of these features indicate that the ITT has to be considered as the first stage in a negotiation; that was the inevitable consequence of it, and indeed was clearly its fundamental purpose. That brings the service of the ITT and accompanying email within the wording of the warranty in paragraph 11.3.

Defender's arguments on paragraph 11.3

[61] The defender founded particularly on the expression "outstanding or ongoing negotiations", and submitted that negotiations must be bilateral or multilateral. In the present case, however, the ITT was no more than a unilateral invitation. In our opinion this ignores the fact that the purpose of the ITT is to initiate negotiations for alternative tender arrangements for the installations served by the S-class vessels. It was further suggested that the negotiations could not be "outstanding" or "ongoing" until two or more parties had

begun to negotiate. Once again in our opinion this ignores the fundamental point that the ITT is intended as the opening stage of a negotiation process. Once it had been served, it can properly be said that there is an "outstanding" negotiation, for the simple reason that Repsol are attempting to renegotiate their charter arrangements, with effect from the moment of service. Indeed, if the defender's construction were correct, the warranty would seem to have effect from the point when another party responded to the ITT rather than the point when the ITT was served. There is no commercial sense in delaying the effect of the warranty in this way, however; once the ITT has been issued, on any objectively reasonable interpretation of the expression "outstanding or ongoing negotiation" a negotiation process is under way.

[62] Counsel also relied on the legal principles established in cases such as *Spencer* v *Harding*, (1870) LR 5 CP 561, *Carlill* v *Carbolic Smoke Ball Company*, [1893] 1 QB 256, and *Harvela Investments Ltd* v *Royal Trust Company of Canada (CI) Ltd*, [1986] AC 207. He submitted that on the basis of those principles the ITT should be regarded as no more than an offer to negotiate, without any intention to begin the process of contract formation. The cases cited, however, deal with situations that are very different from that in the present case. They deal with the question of whether a document is intended as a contractual offer rather than a mere invitation to treat. For the purpose of the warranty in paragraph 11.3, however, the critical question is whether there is a "negotiation". Whether there is must be determined in the context of Repsol's requirements for a charter party and the existing charter arrangements that it had with North Star. In our opinion the issue of the ITT had the clear purpose of signifying that Repsol wished to renegotiate its contractual arrangements for servicing its North Sea facilities. The context is crucial. In the light of that context, what was started must be a negotiation. No formal response is required to reach that conclusion.

Furthermore, the ITT expressly offered a change in the contractual relationship between North Star and Repsol, which by itself appears sufficient to begin a "negotiation".

[63] Finally, on the warranty in paragraph 11.3, counsel for the defender submitted that the wording of the ITT, properly construed, did not evidence either the start or the continuance of negotiations. He submitted that the ITT was a unilateral request for a "tender". Consequently even if a tender were accepted by Repsol a formal contract would have to be agreed. This part of the argument was based on a very minute analysis of some of the terms used in the ITT. In our opinion an analysis of this nature is not appropriate in considering whether the ITT was sufficient to initiate a "negotiation". When regard is had to the fundamental purpose of the ITT, it is obvious that once a response has been received negotiation may begin on the basis of that response. The fact that no formal contract has been agreed at that stage is irrelevant; indeed, if a negotiation is proceeding one thing that is certain is that no formal contract has been concluded. For all of the foregoing reasons we reject the defender's challenge to the Commercial Judge's reasoning.

Clause 8.1.3

[64] Clause 8.1.3 applies during the period between the signing of the SPA and the time of Completion. The Completion Date was defined in clause 1.1 as 6 November 2017, but in fact occurred on 2 November 2017: paragraph [5] of the Commercial Judge's opinion. Clause 8.1 obliges the defender (referred to as the Warrantor, a defined term) to achieve certain results during that period. Clause 8.1.3 obliges him, as soon as reasonably practicable, to notify the Buyer (the pursuer) in writing of any matter which becomes known to him during the period between signature and completion "which constitutes, or might reasonably be expected to constitute, a material event in respect of the Business". The

Business is that of the Company and its subsidiaries, including offshore support operations and emergency response and rescue services. The expression "material event" is not defined. Nevertheless, read in context the expression appears to us to signify a happening that was likely to have a significant effect on the value of the business of the Company and its subsidiaries. That effect on value would in turn have an impact on the equivalence between the price paid by the buy side and the consideration provided in return by the sell side. Generally speaking the equivalence of consideration is an important aspect of commercial common sense, for obvious reasons. In the context of the sale of a business, during the period between concluding of the contract of sale and completion, anything that might have a significant effect on the adequacy of consideration is likely to be regarded as important.

[65] In our opinion the receipt of the ITT, and Repsol's accompanying email, was an "event" that triggered the obligation in clause 8.1.3. The receipt of the ITT and email was plainly a happening. The terms of the ITT made it clear that the presumed *de facto* monopoly that North Star had enjoyed in respect of Repsol's business was liable to come to an end, in part because of the expressed intention to abandon the displacement requirement and in part because of the new requirement for methanol capacity. The loss of the *de facto* monopoly would inevitably have an impact on the equivalence between the consideration provided by the sell side and the price payable by the buy side. As a matter of elementary economics, a monopolist can charge a higher price than a person operating in a competitive market. Consequently it was obvious that the buy side, in the form of the pursuer, would receive less than it had bargained for at the time of the SPA in consequence of the ITT.

[66] The Commercial Judge held (paragraphs [215] *et seq*) that clause 8.1.3 must be construed in the context of the SPA as a whole and the surrounding circumstances as

disclosed in evidence. The purpose of a clause covering the gap between the signing of an agreement and payment of the final sum due at completion was to ensure that by completion the sell side should have all the information that ought to have been provided under the warranties already discussed (those in paragraphs 26.6 and 11.3). The commercial purpose of the clause was therefore obvious: to oblige the defender to bring to the pursuer's notice any matter becoming known to him which constituted, or might reasonably be expected to constitute, a material event in respect of the Business. The Commercial Judge notes that the scope of the clause was very broad; it covered matters that might reasonably be expected to constitute a material event. We agree entirely with that view. Consequently she held that the terms of the ITT were not mere words, but conveyed in words an intention to bring into existence a state of affairs that would have legal effect, in the form of a contract for the services of PSVs that would differ from the existing contract. If North Star did not manage to obtain that contract, that would have an adverse effect on their profitability. We should add that, in view of the loss of the *de facto* monopoly, even if they obtained the contract it would in all probability be on markedly less favourable terms.

[67] It was a requirement of clause 8.1.3 that the matter to be notified should come to the defender's attention. The Commercial Judge addresses this issue on the evidence (at paragraphs [118]-[119]). She clearly formed an adverse view of the credibility and reliability of the defender's evidence. In particular she did not find credible evidence to the effect that the defender had never opened the ITT and had never been told of its terms until the present dispute emerged. She considered on a balance of probabilities that he knew of the principal features of the ITT and Repsol email during the pre-Completion window. That conclusion is not challenged, and we have no hesitation in accepting it. On that basis it cannot be argued that the defender was unaware of the terms of the ITT and email during that window.

Defender's arguments on clause 8.1.3

[68] For the defender it was submitted that clause 8.1.3 should be construed in accordance with the ordinary and natural meaning of the words used. The critical question was whether the "matter" referred to in the clause "constitutes" a material event. It was not enough that the matter should be an initial step in a chain of events that might lead to a material event. On that basis the ITT was not a material event in relation to the Business; the word "event" was not an apt description of the terms of a document. In our opinion this argument must be rejected. A document may obviously have legal effect. The ITT clearly had potential legal effect, in that it disclosed an intention to invite new tenders for the services rendered to Repsol, on a basis that was inconsistent with a continuance of the existing arrangements by exercise of the contractual options. The event is not the "terms" of the ITT, but rather the practical effect that the ITT had in the real commercial world.

[69] The defender further submitted that in so far as the ITT might constitute an "event", that event took place before the conclusion of the SPA. Thus the warranty in clause 8.1.3 was not engaged. This argument too must be rejected. The Commercial Judge held specifically that it was more likely than not that the defender knew of the principal features of the ITT and Repsol email during the pre-Completion window (paragraph [119]). She further rejected a suggestion by the defender that the buy side were aware of the ITT prior to Completion. The first mention of the ITT was, in her view, "intended materially to underplay its terms and effect and, in that respect, was disingenuous and misleading" (paragraph [120]; see paragraph [33] above). On those findings in fact, which were not the subject of any direct challenge, the defender knew of the ITT and at least its principal

features during the pre-Completion window, when clause 8.1.3 applied. That directly triggers the application of the clause.

Conclusion

[70] For the foregoing reasons we are of opinion that the Commercial Judge reached the correct decision on the defender's breaches of contract. We will accordingly refuse the reclaiming motion against her interlocutor. Thereafter we will remit the action to the Commercial Court for further procedure in accordance with the Commercial Judge's interlocutor of 11 September 2019; this will take the form of a proof before answer on quantum.